

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 40 OF 2019.

VENKATESH ATCHUT NAIK
DALAL AND 4 ORS.,

... Appellants

Versus

GOPALKRISHNA TRIVIKRAM
DALAL AND ANR.,

... Respondents

Shri A. R. Kantak, Advocate for the appellants.

Shri C. A. Coutinho and Shri I. Santimano, Advocates for the respondents.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 6th March 2020

P.C.

When the Inventory Proceedings concluded, the appellants were aggrieved. So they filed the First Appeal before the District Court, Margao. But that was with a delay of 48 days. To have that delay condoned, the appellants applied under Section 5 of the Limitation Act. Nevertheless, the District Court dismissed that application, through its order, dated 30.1.2019.

2. Aggrieved, the appellants initially filed a Writ Petition; later, they converted that into a Second Appeal. The appellants' counsel informs me that they were constrained to convert the Writ Petition into a Second Appeal because of the Registry's objections. As seen from the record, the impugned order or judgment concerns the delay condonation application; it does not even remotely refer to the appeal which remains still born because of the delay.

3. Under these circumstances, I reckon, as I have already held in other cases, the appropriate course for the aggrieved party is to file a Writ Petition under Article 227 of Constitution of India because an order under Section 5 cannot attract the mandate of Section 100 of CPC. So no second appeal lies.

4. That said, I do not intend to drive the parties to another round of course correction in the name of adherence to technicalities. Suffice if I treat this appeal as a writ petition especially challenging the Appellate Court's findings on the delay condonation. This dispenses with the need of the appellants or the petitioners framing any substantial question of law.

5. Thus treating this Second Appeal as a petition under Article 227 of the Constitution, I have heard the learned counsel for the petitioners and respondents.

6. In their application to have the delay condoned, the petitioners have pleaded that the first petitioner's wife was ill and was hospitalised. Then, on medical advice, he had to monitor her condition even at home, when she had been on bed. Besides, the first petitioner has also pleaded, in his view, other compelling circumstances that disabled him from filing the appeal on time.

7. Indeed, the first petitioner has produced a medical certificate in support of his contention about his wife's ill health, apart from explaining why he could not file the appeal soon after his wife's

recuperation. But the learned District Judge has refused to rely on the medical certificate, nor has he found the petitioner's explanation convincing, to condone the delay.

8. I must fairly note that the impugned judgment or order does not suffer from any vice of non-application of mind; it elaborately stated why the delay should not be condoned. But, after all is said and done, the delay is of 48 days and the petitioners have, at least, a plausible explanation for the delay. And that explanation ought to have allowed them to earn a delay condonation and to contest the appeal on merits. The Courts, as a matter of prudent public policy, desire to resolve the disputes on merits rather than let them suffer on technicalities.

9. Under these circumstances, I set aside the impugned judgment and allow the application for condonation of delay. The delay of 48 days is condoned. As a result, the appeal before the Appellate Court stands restored. At any rate, the delay is condoned on the condition of the petitioners' paying a cost of Rs.5000/- to the first respondent in two weeks after this judgment is uploaded. Once the petitioners produce the receipt showing the payment of costs, the Appellate Court will take up the matter on the merits.

No order on costs.

DAMA SESHADRI NAIDU, J.